TOPICAL INDEX.

CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 469

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, NATIONAL COUNCIL OF TRAVELING SALESMEN'S ASSOCIATIONS, ET AL., *Appellants*,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, ATLANTIC CITY RAILROAD COMPANY, ATLANTIC & ST. LAWRENCE RAILROAD COMPANY, ET AL., *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF ON BEHALF OF NATIONAL COUNCIL OF TRAVELING SALESMEN'S ASSOCIATIONS, APPELLANT.

This is an appeal from a decision rendered in the United States District Court for the District of Massachusetts, Judge Mack of the Circuit Court, and Judges Morris and Brewster of the District Court, presiding, permanently enjoining an order of the Interstate Commerce Commission in what was known as the Interchangeable Mileage Ticket Investigation.

The Commercial Travelers' Mutual Accident Association of America, Utica, N. Y., an organization affiliated with the National Council of Traveling Salesmen's Associations, while not formally a party, joins in this brief.

AMENDMENT, ORDER OF THE COMMISSION, AND OPINION OF THE LOWER COURT

The order of the Commission was passed pursuant to the amendment to Section 22 of the Interstate Commerce Act, approved August 18, 1922, which provides:

> "(2) The Commission is *directed to require,* after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at *just and reasonable rates,* good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission *may in its discretion exempt* from the provisions of this amendatory Act either in whole or in part *any carrier* where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be *issued in such denominations as the commission may prescribe.* Before making any order requiring the issuance of such tickets, the commission shall make and publish such reasonable rules and regulations for their issuance and use *as in its judgment the public interest demands;* and especially it shall prescribe whether such tickets are *transferrable, or nontransferrable,* and if the latter, *what identification may be required;* and especially, also to what baggage privileges the lawful holders of such tickets are entitled.

"(3) Any carrier which, through the act of any agent or employe, willfully refuses to issue or accept any such ticket demanded or presented under the lawful requirements of this Act, or willfully refuses to conform to the rules and regulations lawfully made and published by the commission hereunder, or *any person who shall willfully offer for sale or carriage any such ticket contrary to the said rules and regulations,* shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not to exceed $1,000."

Pursuant to this amendment, the Commission instituted an original proceeding on its own motion, and assigned a hearing date (pp. 16-18).

After a full hearing, in which all of the testimony adduced by the parties was considered, the Commission issued its order of January 26, 1923, which read, in part, as follows:

"We find and conclude that on and after March 15, 1923, carriers by rail, respondents herein, enumerated in Appendix C, shall establish, issue and maintain, at such offices as we may hereafter designate, a nontransferrable interchangeable scrip coupon ticket in the denomination of $90, *which shall be sold at a reduction of 20 per cent from the face value of the ticket. We further find that the rates resulting from that reduction will be just and reasonable for this class of travel.* This scrip coupon ticket shall be good, within one year from the date of its sale, for carriage of passengers on all passenger trains operated by said respondents except that in the case of special or extra fare trains its use will be subject to the payment by the passenger of the special or extra fare. Respondents shall keep a record of the use of the

*Except as otherwise indicated, references are to pages of Transcript of Record. (Italics ours throughout.)

tickets during the first 12-month period which should reflect its effect on passenger revenues, the number of scrip tickets sold, and the gross revenue derived from their sale. Parties other than carriers, primarily interested in this experiment should likewise record their experience with this ticket in order that the actual results of the experiment may be ascertained to the fullest extent possible. *Any party to this proceeding may bring the matter to our attention for further consideration* on or about January 1, 1924, with such statements as they choose to make concerning the operation and effect of the scrip tickets."

The Judges heretofore named, sitting in the United States District Court for the District of Massachusetts, entered a final decree, and gave an opinion in support of the decree.

The opinion in part stated:

"Although the carriers opposed any reduction in rates for the scrip coupons below the standard rates, it is clear from the record that the commission proceeded on the assumption that *the spirit and theory of the congressional amendment required them to order* the scrip coupons to be issued at reduced rates, at least insofar as such rates could not be deemed confiscatory. There is *no finding in the record that would indicate that the Commission,* if it had exercised an independent judgment apart from what it conceived to be the plain spirit and theory of the amendment, would have ordered the scrip coupons to be issued at reduced rates. *The only finding* of the Commission that could possibly be relied upon as indicating that the commission exercised an independent judgment is the statement in the majority report that, 'in addition to the obvious spirit of the law, *the record warrants the view that a coupon ticket at a reasonably reduced fare should*

be established, at least for an experimental period.' But this finding is followed by the statement that 'in no other way can the apparent purpose of the law be given practical effect.' It would seem fairly plain, therefore, that the furthest the commission goes in its finding is to conclude that the record might justify the issuance of coupons at reasonably reduced rates for an experimental period; *but there is nothing to indicate that the commission, if it had felt free to exercise its own judgment, would have assumed the responsibility for establshing the reduced rate, even for an experimental period.*

"It is not entirely clear whether the majority of the commission acted under an interpretation of the amendment that it was mandatory upon them so to reduce the rates for interchangeable scrip coupon tickets or upon an assumed desire of the Congress, though not expressed by the amendment in mandatory form, that they should so do. In our judgment, the amendment is not mandatory in this respect. It does not prescribe that such coupons shall be issued at a reduced rate. Attempts to fix specific reduced rates by legislation were defeated. If the Congress had intended that some reduction should be mandatory leaving only the amount thereof to be determined by the commission under the phrase 'just and reasonable,' such intent could readily have been expressed in clear language. The fair and natural interpretation of the language used by the Congress makes mandatory the issuance of such cuopons at just and reasonable rates, but the ultimate if not the original determination of what shall be just and reasonable rates for such coupons is placed entirely upon the commission. If, therefore, the commission acted upon a different interpretation of the amendment, an error of law was the basis of its action and order. 'The question is of the meaning of a statute, and upon that, of

course, the courts must decide for themselves.' *Chicago, Milwaukee & St. Paul Ry. Co. vs. McCaull-Dinsmore Co.*, 253 U. S. 97. If, on the other hand, it acted upon the *interpretation which we have found to be the correct interpretation of the amendment*, but based its conclusions not upon its own independent judgment, but upon what it believed to be the spirit and purpose of the act, which, if it means something other than a sound interpretation of the act, must mean some supposed desire of the Congress, *it acted contrary to law in abdicating the functions vested in it.*

"In either case its order is without warrant of law and for this reason must be annulled." (Italics ours.)

The Court below sustained defendant in error on but one of the allegations in the complaint. The Court granted the injunction only because it found that the Commission had construed the Act of Congress of August 18, 1922, to require a reduction of rates when the interchangeable mileage or scrip coupon book was sold by the railroad companies, or else the Commission did not exercise its own judgment and acted contrary to law, by abdicating the functions vested in it; the Court held "in either case its order is without warrant of law and must be annulled."

PETITION AND ARGUMENT OF APPELLEES

While the petition contained 24 different sub-heads, the contentions presented by appellees in the lower court were embraced in the following propostiions:

1. The Commission has erred in construing the Amendment as intended by Congress to require the carriers to issue interchangeable tickets at reduced rates.

2. The Commission erred in thinking that "this Amendment contemplates that carriers shall be required to recognize an additional class of passenger travel and to provide a special form of ticket which shall be issued at just and reasonable rates fixed by us to cover such travel."

3. In the respect that the Commission's order is an arbitrary and unreasonable discrimination in fares between scrip-coupon passengers and regular-fare passengers, it is beyond the power of the Commission and lacks due process of law.

4. The Act, since it requires one carrier to transport passengers upon the credit of every other carrier, violates the Fifth Amendment, taking the carrier's property without due process of law.

5. The statute is unconstitutional because it delegates legislative power to the Commission without fixing any standard to guide the Commission's actions.

6. The order is void because there was no substantial evidence to support it, and because the Commission's action in making it was arbitrary and beyond its authority.

IT WAS CLEARLY THE EXPECTATION OF CONGRESS THAT MILEAGE OR SCRIP COUPON BOOKS WOULD BE SOLD AT REDUCED RATES.

It is difficult to see how anyone familiar with the history of mileage or scrip coupon books, and with the history of this legislation, can read the amendatory Act without reaching the conclusion that these tickets were expected by Congress to be sold at less than the regular cost of ordinary tickets.

For years prior to June, 1918, mileage books or scrip coupon books had been sold by nearly all of the railroad companies. They covered, as a rule, trans-

portation for 1,000 miles over the road selling, and in many instances over a combination of roads, good for transportation on any of the same. These tickets were sold at reduced rates, varying from 10 per cent reduction to 33 1-3 per cent reduction. In June, 1918, the Director General of Railroads stopped the sale of mileage or scrip coupon books for the purpose, as has been claimed and never denied, of discouraging travel.

Subsection 1 of Section 22 of the Interstate Commerce Act authorized the sale of mileage books at reduced rates, in the following language:

> "Section 22. (1) That nothing in this Act shall prevent * * * the issuance of mileage, excursion or commutation tickets."

Thus in the Interstate Commerce Act the terms "mileage," "excursion," and "commutation" were treated in the same way, and as excursion, and commutation tickets were issued at reduced rates it was evident that mileage tickets also were expected to be issued at reduced rates, and were treated as tickets issued at reduced rates.

> (The statements of fact contained herein are taken from the Transcript of Record, and were presented as evidence before the Commission, except as they are quoted from the Congressional Record.)

THE HISTORY OF THE LEGISLATION CONFIRMS THE VIEW WHICH WE HAVE SUGGESTED.

Prior to Federal control of the railroads, the standard fare for interstate travel, in a great part of the country, was approximately 2.5 cents per mile, and

for intra-state travel, in many of the states, it was 2 cents per mile. The Director General of Railroads established a minimum rate of 3 cents per mile. In August, 1920, the Interstate Commerce Commission increased the rates 20 per cent, and also allowed the railroads to add a surcharge for Pullman service, this surcharge going not to the Pullman Company, but to the railroads.

In June, 1918, the Director General of Railroads passed an order placing the rate of transportation at 3 cents per mile, and providing that:

> "All passenger fares lower than those hereinbefore prescribed, such as mileage, party, second-class, immigrant, convention, excursion and tourist fares, shall be discontinued until further notice, except that tourist fares shall be re-established as prescribed in section 8, paragraph (b) hereof."

Paragraph (b), Section 8, provided:

> "Round-trip tourist fares shall be established on a just and reasonable basis bearing proper relation to the one-way fares authorized by this order, and tariffs governing same shall be filed as promptly as possible with the Interstate Commerce Commission."

Scrip coupon books were subsequently issued and used to a very limited extent, at standard rates, but what were generally known as mileage books and scrip coupon books were those issued at reduced rates prior to June, 1918.

Subsequently, and after the period of Federal control, the railroads returned to their practice of issuing tourist tickets, excursion tickets, resort tickets, convention tickets and commutation tickets at substan-

tially reduced rates, and while mileage books and scrip coupon books had been recognized as in the same class as excursion tickets, tourist tickets, resort tickets, convention tickets and commutation tickets, to be sold at reduced rates, the railroad companies have never restored this practice.

While excursionists, resort visitors and tourists were still given rates at from 20 to 33 1-3 per cent less than the standard fare, and while those living near large cities were sold commutation tickets at greatly reduced rates, the men who were compelled to travel the country over, great distances each year, on account of their business, and who had prior to June, 1918, been sold mileage or scrip books at reduced rates, were receiving no recognition whatever.

A man who went from Chicago or Boston to Miami, Florida, as a resort visitor could have six months in which to return, selecting his own time, during that period, when he would return. The tourist could obtain his ticket to Los Angeles, with practically no restrictions. But the traveling salesman, whose business required him to travel just as many or more miles, and the business or professional man, who was required to do extensive traveling, after June, 1918, received no such right as was given by the issuance of mileage or scrip books prior to June, 1918.

It was this condition which confronted the Congress meeting in December, 1921. There was demand from all over the country for restoration of the mileage or scrip coupon book in use prior to June, 1918, and the mileage or scrip coupon book meant a book providing for 1,000 or more miles of transportation at reduced rates, the reductions ranging, according to past practices, from 10 to 33 1-3 per cent. A mileage or scrip coupon book was understood to mean just as definitely

a book at a reduced rates as the excursion ticket, the resort ticket, the tourist ticket or the commutation ticket.

It was this situation which brought the question so forcibly to the attention of Congress, and the amendment under which the Commission is acting was passed with practical unanimity by both Houses of Congress.

Fourteen bills were introduced in Congress providing for mileage or scrip coupon books. The bills named rates of reduction from the 3.6-cent rate, ranging from 10 to 33 1/3 per cent.

In the Senate, bills providing for mileage books at reduced rates were introduced by Senators Watson, of Indiana; Robinson, of Arkansas; McKellar, of Tennessee; Spencer, of Missouri; Harris, of Georgia, and others; and in the House of Representatives, similar bills had been introduced by Representatives Kahn, of California, Barclay, of Kentucky, and others.

The bills in the Senate were referred to the Committee on Interstate and Foreign Commerce, which was very much crowded with work, and by unanimous consent, on the motion of Senator Robinson, the Committee was relieved of the consideration of the bill introduced by Senator Watson, of Indiana, and a time was named for the consideration of the bill in the Senate.

In connection with the unanimous consent, Senator Robinson offered quite an elaborate statement on mileage books. The entire subject was dealt with in this statement upon the theory that mileage books carried rates reduced from the standard rates.

With reference to this measure, the following extracts are given from expressions by senators.

Senator Cummins, Chairman of the Committee on Interstate and Foreign Commerce, who opposed legis-

lation which would take from the Interstate Commerce Commission the duty of fixing the rate on interchangeable mileage books, and whose substitute for the numerous bills fixing specific reductions of rates was adopted by the Senate, made the following statement in support of his substitute, which appeared in the Congressional Record of January 19, 1922:

> "It must be observed from what I have stated that I do not approach the discussion of this question in a hostile spirit. I mean, I recognize the demand which the commercial travelers of the United States have made for this form of transportation, and I am not prepared to say that they should not have the privilege of buying transportation, at wholesale at lower rates than the person who buys a specific ticket for a particular journey. In so far as the selling of transportation in this way and in so far as all the operations which are connected with that transportation are concerned which tend to reduce the cost of the service, the Interstate Commerce Commission may very well, in my judgment, establish a lower rate per mile than the ordinary rate which is now in force or which may be in force at any given time."

Senator McKellar said:

> "Mr. President, the necessity of this legislation, it would seem to me, would be obvious to anyone. * * * We are not seeking, Mr. President, to put any new or untried policy upon the railroads. We are simply readopting that wise policy which the railroads themselves had followed for many years prior to Government control. * * * It is, in either respect, obviously for the best interests of the railroads. The undisputed proof is that business firms have had greatly to decrease their number of commercial travelers because of

> the excessive rates. * * * Every time a drummer sells a bill of goods for his house, he also sells transportation to the railroads; not only his own transportation, but transportation for the goods which he sells * * *. Under these circumstances, it seems to me a badly misguided self-interest on the part of the railroads when they do not welcome the sale of mileage books. * * * The books will undoubtedly bring about an increase of travel, and for the same overhead greater revenues could be made from a lower passenger rate."

Senator Cummins, who opposed the flat reduction of one cent per mile by Congressional action, and favored leaving to the Commission the responsibility of fixing the rate, said:

> "I am assuming that men who ride on trains are ordinarily intelligent, and while they could easily perceive the justification for some difference in the rate, they would not be able to perceive the reason for the difference of one cent per mile in the rate."

Senator Poindexter said:

> "It is objected that the bill is class legislation, in the interest of traveling men, or commercial travelers, as they are called. I fail to see upon what that objection is based, inasmuch as this special rate mileage ticket is purchasable by any one who chooses to take advantage of it."

He then called attention to a ticket voluntarily being sold by the railroads; an all-year-round tourist ticket, from Chicago throughout the West to the Pacific Coast and return, and said:

"The ticket is good for nine months, and the rate per mile is 2.4 cents, which is a lower rate than that which is provided for in the pending measure."

A substitute for all of the bills which attempted to fix the rate at which mileage books were to be sold, had been generally agreed upon by senators, and Senator Lenroot said, with reference to the substitute, which was not changed in the House of Representatives, so far as it affected the question of rates:

"I have long been interested in the subject of securing interchangeable mileage books. * * * Under it, if the House will agree, it is assured that interchangeable mileage books will be compelled by the Interstate Commerce Commission to be issued, and at a substantial reduction, because there can be a substantial reduction without loss of revenue from the existing single fare rates."

Among other things, Senator Robinson, discussing the question of mileage or scrip coupon books in general, said:

"Let me turn briefly to a consideration of what I believe will be the reasonable effect of this legislation. First, it will tend to stimulate travel. The railroad executives of the country do not seem to realize that by the maintenance of both excessive passenger and freight rates business which ordinarily should be conducted on the railroads is being diverted to other instrumentalities."

He then pointed out the increasing use of automobiles in passenger and freight traffic, and continued:

"The reason in part for it is that both passenger and freight rates are too high on the railroads. If freight rates were reduced * * * it would probably promote more business and

yield more revenue than the railroads are now receiving, and the same is true of passenger rates.

"I know that thousands of cases exist where business is being discouraged, retarded and hampered * * * by reason of the very excessive rates.

"I know that thousands of traveling men in the United States * * * have left the road. Some drummers are traveling in automobiles and some are staying at home, for the reason that the passenger rates which they are compelled to pay have discouraged their employers, and have induced them to adopt a restrictive policy in their business."

It is true that some of the members of Congress objected to the bill because it did not definitely require the Commission to issue the ticket at a reduced rate, but no doubt was expressed that under the evidence which would be produced, the Commission would make a reduction in the rate.

THE ACT FURNISHED MACHINERY FOR A MILEAGE OR SCRIP COUPON BOOK TO BE ISSUED AT LESS THAN STANDARD RATES.

This amendatory act required the Commission to direct the railroads to issue mileage or scrip coupon books, and it is difficult to see how anyone could doubt, from the statements made by the Chairmen of the Committees in charge of the legislation in Congress, by the leaders who discussed the subject, and from the language of the amendment itself, that Congress expected these tickets to be issued at a rate less than the standard rate.

There are a number of provisions in the amendment which clearly show the purpose and spirit of the Act

was to furnish machinery for tickets issued at reduced rates.

The Commission was directed to require interchangeable mileage or scrip coupon books at just and reasonable rates.

The interchangeable mileage and scrip coupon tickets had been customarily issued at reduced rates; the very name indicates a ticket to be sold at a reduced rate.

The railroads were at the time issuing a scrip coupon book at a 3.6-cent rate. There was no occasion for the legislation unless the books were expected to be issued at reduced rates.

The Commission was to determine the denominations of these tickets. This was because the size of the tickets would affect the rates.

The Commission was to make rules and regulations for their issuance as in its judgment the public interest demanded, and especially to prescribe whether the tickets should or should not be transferable. This was because the tickets were expected to carry some reduction in price, and if not transferable identification of the party to whom issued should be required.

What the public interest demanded, the nontransferable character of the ticket, the identification of the holder; all of these provisions were logically connected with a ticket sold at a reduced charge. They were worth nothing to the railroad companies or the public unless the tickets were sold at reduced prices.

But perhaps the strongest feature of the amendment, showing that the tickets were expected to be sold at reduced prices is the provision making it a misdemeanor for any person willfully to offer for sale or carriage any ticket, contrary to the rules and regulations fixed by the Commission. *It was to enable the*

Commission to provide a ticket at reduced rates and to make it nontransferable that provision was required to prevent scalpers from handling these tickets, and also to prevent an offer to use by anyone except the original purchaser.

All these safeguards were provided in order that the Commission might direct the issuance of mileage or coupon books at reduced rates.

We submit with great confidence that this Act authorizes the conclusion that "the obvious spirit" and the "apparent purpose of the law" was that the mileage or scrip books would be required by the Commission to be issued at less than the standard rates.

THE COMMISSION IN NO SENSE ABDICATED THE FUNCTIONS VESTED IN IT

The lower court failed to observe a number of statements in the opinion of Commissioner Meyer which show clearly that the Commission did not abdicate its functions, but passed definitely upon the question of what were just and reasonable rates for these tickets.

Among the questions propounded by the Commission upon which evidence was invited, was:

> "2. What rate or rates shall be established as just and reasonable for each or either form of ticket?"

Referring to the Act, Commissioner Meyer said:

> "The amendatory act affirmatively directs us to require, after notice and hearing, each carrier by rail subject to this act to issue, at such offices as may be prescribed by us, interchangeable mileage or scrip coupon books at 'just and reasonable

rates, good for passenger carriage upon the passenger carrying trains of all carriers by rail subject to this Act.' * * *

"*The Act is* MANDATORY *in that it directs us, after notice and hearing, to require each carrier by rail subject to the Act to issue interchangeable, mileage or scrip coupon tickets. It is* DISCRETIONARY *in that we may prescribe either an interchangeable mileage ticket or a scrip coupon ticket.* IT IS ALSO LEFT TO OUR JUDGMENT TO DETERMINE, AFTER NOTICE AND HEARING THE JUST AND REASONABLE RATES AT WHICH THE FORM OF TICKET PRESCRIBED SHALL BE ISSUED.

" * * * The amount of the rate is the most important question before us in this proceeding. * * *"

The lower court entirely ignored the statements in the opinion of Commissioner Meyer, which clearly point out that the Act was mandatory in that it directed the issuance of the interchangeable mileage or scrip coupon ticket, but that it left to the judgment of the Commission the determination of what would be "just and reasonable" rates.

The further statement is made in the opinion of the Commission that:

"The amendment contemplates that carriers shall be required to recognize an additional class of passenger travel and to provide a special form of ticket *which shall be issued at just and reasonable rates fixed by us* to cover such travel. *The greatest users of this class of travel, if available at rates lower than the standard rates,* will undoubtedly be commercial salesmen, business men, professional men, and others who make frequent trips. * * *"

Here again the Commission declared that the just and reasonable rates were to be fixed by the Commission.

The Commission declares that the amendment contemplates the recognition of an additional class of passenger travel for which they are to provide special forms of tickets, at just and reasonable rates fixed by the Commission. There can be no doubt that persons traveling 2,500 miles a year can be classified as passengers distinct from those who travel 10, 100, or even 500 miles a year.

The Commission added that the greatest users of this class of travel, if available at rates lower than the standard rates, will undoubtedly be commercial salesmen, business men, professional men, and others who make frequent trips. The Commission had just stated that the just and reasonable rates were to be fixed by it, and clearly they held that it was left to them to determine whether the rates were to be lower than the standard rates.

The language used by the Commission also clearly indicated by the use of the words "if available at rates lower than the standard rates," that the Commission did not consider itself compelled to fix a lower rate for this class, but fully recognized that the rate was to be fixed by the Commission.

Commissioner Meyer further said, expressing the opinion of the majority of the Commission:

> "The spirit and apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare, *which would be just and reasonable because it would be sold in such quantities as to stimulate travel*, and thereby increase net revenue or at least offset any

> loss in revenue that might result from the reduction, in which event the carriers would render greater service to the public. It is a well recognized rule in trade and commerce that, other things being equal, as the price of an article is lowered the sales increase. And the fact that for many years prior to Federal control carriers voluntarily sold mileage books at discounts ranging from 10 to 33 11-3 per cent is not without significance."

The Commission, in referring above to the spirit and theory of the law, did not in any sense mean that the Commission was required to make a reduction in the rate on the tickets unless the Commission found such reduction would be just and reasonable.

The Commission had expressly stated, just prior to this in their opinion, that, while the Act directed them to require the railroad companies to issue the mileage book or scrip coupon book, it was left to the Commission to determine the rate, and to determine what was just and reasonable. So that the language referring to the spirit and theory of the law could only have presented the view of the Commission as to what Congress anticipated would be the result of action by the Commission, performing its duty of investigation and determination of what would be just and reasonable.

This is further sustained by the fact that the Commission proceeded thereafter to make the investigation and to determine themselves what would be a just and reasonable rate.

The Commission itself approved what it said was the spirit and theory of the law, and found that some reduction in the standard fare on this ticket would be just and reasonable, because:

> "It would be sold in such quantities as to stimulate travel and thereby increase net revenue or at least offset any loss in revenue that might result from the reduction, in which event the carriers would render greater service to the public."

There was nothing inconsistent in the Commission's making this independent finding for itself, and at the same time referring to the evident spirit and theory of the act as indicating that such a reduction would be made.

The Commission nowhere stated that the reduction was made because of the apparent spirit and theory of the Act.

They were fully justified by a consideration of the Act in finding that the spirit and theory of the Act showed a reduction of rates was anticipated.

They were fully justified by the evidence submitted to them in finding, independent of the spirit and purpose of the Act, that it was just and reasonable to issue these tickets with the reduced rate. Indeed, to have done otherwise would have been entirely unjust and unreasonable.

Commissioner Meyer further said:

> "In addition to the obvious spirit of the law, *the record warrants the view that a coupon ticket at a reasonably reduced fare should be established*, at least for an experimental period. In no other way can the apparent purpose of the law be given practical effect."

This was the paragraph quoted by the lower court, upon which its conclusion was based that the Commission misconstrued the Act of Congress and "abdicated its functions;" failing to determine for itself that the "reduction was just and reasonable."

The Commission expressly declared that the record warranted the view that a coupon ticket at a reasonably reduced fare should be established. This one extract from the opinion of Commissioner Meyer, if considered alone, was inconsistent with the conclusion of the lower Court.

The Court, in referring to this language of the Commission, says that the Commission found the record "might justify" the view that a coupon ticket at a reasonably reduced fare should be established. The Commission found nothing of the kind. They did not use the words "might justify." They definitely found that "the record warranted" a coupon ticket at a reasonably reduced fare.

But following this expression was the final conclusion of the Commission in which they definitely determined that the rate reduction prescribed "will be just and reasonable for this class of travel."

Commissioner Meyer said:

> "We find and conclude that on and after March 15, 1923, carriers by rail, respondents herein, enumerated in Appendix C, shall establish, issue and maintain, at such offices as we may hereafter designate, a nontransferrable interchangeable scrip coupon ticket in the denomination of $90, which shall be sold at a reduction of 20 per cent from the face value of the ticket. *We further find that the rates resulting from that reduction will be just and reasonable for this class of travel.*"

The opinion of Commissioner Meyer went fully into the question and discussed the evidence, and a majority of seven of the Commissioners fixed 20 per cent as the reduction which would be just and reasonable. If the Commission had simply acted upon the theory that

the amendment required a reduction, they were perfectly free to have made a reduction of very much less than the 20 per cent. The fact that they fixed 20 per cent as the amount of the reduction was a determination by the Commission of what they considered just and reasonable, and it is hardly fair to the Commission to suggest that they abdicated their functions.

If they had not found that 20 per cent was a just and reasonable rate, and the proper rate at which to inaugurate the use of the coupon mileage book, they could have made that rate 10 per cent or 5 per cent.

The further fact that the Commission made this order, in effect, an experimental reduction, shows they were exercising their own judgment without reference to the spirit and theory of the Act, for they reserved the right to lessen the reduction, or even to remove it, if subsequently, by the experiment, it was found just and reasonable that this should be done.

We have shown that the very passages relied upon by the lower Court are inconsistent with its decision, and that the passages it seems to have ignored show clearly that the Commission acted recognizing that it was free to fix *any* rate which would be just and reasonable.

The answer of the Commission, sworn to by Commissioner Meyer, emphasizes the course pursued by the Commission. In it, it is stated:

> "That said findings, conclusions, rules and regulations were and are, and each of them was and is fully supported and justified by the evidence submitted to the Commission in said proceeding as aforesaid. * * * The Commission considered and weighed carefully, in the light of its own

knowledge and experience, every fact, circumstance and condition called to its attention.

"The Commission further alleges that the rate at which the carriers named in said order of March 6 are required to establish, issue, maintain, and keep in force, the nontransferrable interchangeable scrip coupon ticket referred to in said order, will furnish to the carriers covered by the order including the petitioners herein, full, reasonable, fair, and just compensation for services to be performed by them and included in said rate, and denies each of and all the allegations to the contrary contained in said petition."

We submit that a fair consideration of the action of the Commission shows that the Commission considered all the facts submitted, and found that it was only just and reasonable the script coupon ticket should carry a reduced rate. The Commission definitely determined what that reduced rate should be, the final conclusion of the Commission having been that the 20 per cent reduction was just and reasonable and should be put in force.

THE EVIDENCE BEFORE THE COMMISSION FULLY JUSTIFIED ITS ACTION

On August 25, 1922, the Commission issued an order providing for the investigation, in pursuance of the Act of August 18, 1922, amending Section 22 of the Interstate Commerce Act, known as the Interchangeable Mileage Ticket Investigation.

Notice of the investigation was given, much evidence was introduced before the Commission, and the order complained of was passed by the Commission, providing for nontransferable scrip coupon tickets covering 2,500 miles, at 20 per cent discount from the regular rates.

The coupon ticket was adopted as a matter of convenience, to facilitate the execution of that part of the order which provided that in the case of special or extra fare trains, its use should be subject to the payment by the passenger of the special or extra fare.

It appeared in the hearings before the Commission that many business houses were curtailing the number of traveling salesmen upon the road, on account of the high rate for passenger transportation.

The Transcript of Record, from pages 237 to 284, gives evidence upon this subject, and shows clearly that the use of a mileage or scrip coupon book at a reduced rate would enormously increase the number of those occupying cars of the railroad companies, also that this increase of travel would result in no substantial increase in operating cost to the railroad companies.

The size of the ticket was made 2,500 miles. It is not a ticket suited to general use, but only to a particular class, those who travel 2,500 miles or more a year, as distinct as those classes to which the railroads are now voluntarily giving reduced rates.

The Commission among other things said:

> "It is a well-recognized rule in trade and commerce that, other things being equal, as the price of an article is lowered the sales increase. And the fact that for many years prior to Federal control carriers voluntarily sold mileage books at discounts ranging from 10 to 33 1-3 per cent is not without significance. That commutation and excursion fares created traffic is conceded by carriers. * * *"

It is true that the Commission stated there was no evidence which proved the mileage books used *in*

the past stimulated travel. But they called attention to the testimony which indicated clearly that this ticket would stimulate travel, *in the future,* and this fact was overwhelmingly shown by the evidence before the Commission.

The Commission then points out that

> "The testimony of merchants, manufacturers, and commercial travelers is to the effect that an interchangeable mileage ticket at reduced fares would result in a greater number of salesmen being put on the road. And, of course, the use of such a ticket would not be restricted to commercial travelers and business men."

The Commission further stated that the average number of passengers per train, which in 1916 was only 57, increased gradually thereafter until *in 1919 it was 82,* but decreased rapidly after the rate of fare was increased 20 per cent in August, 1920, until for the first six months of *1922 it was only 60;* that during the same time the average number of passengers per car, which in 1916 was 16, increased gradually until in 1919 it was 21, but for the first six months of 1922 was only 15; that the revenue passenger miles which in 1916 totaled 34,586,000,000 increased gradually thereafter until in 1919 they were 46,358,000,000, but for the first six months of 1922 were only 16,487,000,000; that the carriers now have in effect commutation, convention, excursion and summer and winter fares which are less in each instance than the standard fare; that the carriers now have in effect an interchangeable scrip coupon ticket, in denominations of $15, $30 and $90, which they sell at the rate of fare of 3.6 cents per mile, and there is evidence in the record which was before the Commission to the effect that carriers now sell

tourist and summer and winter excursion tickets at rates of fare which are 33 1-3 per cent less than said standard rate of fare.

The claim by the appellees that, from the increase of travel induced by the scrip coupon book ordered by the Commission there should be deducted the entire average cost to the railroads of haulingg passengers cannot be sustained. The number of passengers per car was 16 in 1916 and 21 in 1919, but for the first six months of 1922 it was only 15, and the revenue passenger miles had decreased from 34,586,000,000 in 1916 to 16,487,000,000 during the first six months of 1922.

The passenger cars were therefore being hauled with a much less number of passengers than they were made to accommodate. The addition of passengers in these cars could take place with no addition of cost to the railroad companies. One additional passenger per car, furnished as a result of this scrip coupon book, would more than compensate the railroad companies for the reduction of fare.

It is erroneous to claim that the standard transportation rate as established by the 20 per cent increase allowed by the Commission in 1920 puts the standard fare at 3.6 cents per mile. The increase was 20 per cent on all fares, including reduced fares as well as the 3 cent fare allowed by order of the Director General.

When we take into consideration the amount of travel on commutation, convention, excursion, tourist and other forms of reduced rate tickets, the average per mile charged by the carriers was little more than the amount which will be required under the scrip coupon book with the 20 per cent reduction.

The appellees have insisted that the Commission found the operating ratio for passenger service at

the present rate of 3.6 cents per mile to have been, for the first six months of 1922, 85.24 per cent, and that therefore it cost the carriers 3.06 cents per mile to transport each passenger.

This line of argument of appellees is based solely upon the theory that each passenger paid 3.6 cents per mile. It leaves entirely out of consideration the fact that large numbers of commutation and other reduced rate tickets were sold.

It appears from the record that, for the first six months of 1922, the gross passenger revenue of appellees was approximate $500,000,000. It appears also that the revenue passenger miles were shown to be 16,487,000,000 for that year. Dividing the gross passenger revenue by the mileage gives 3.03 cents instead of 3.6 cents, as the average rate paid per passenger mile. *Applying the operating ratio of 85.24 per cent, to the actual average rate paid per passenger mile, 3.03 cents, gives the expense per passanger mile to the railroads 2.58 cents instead of 3.06 cents. So that the rate now fixed by the Commission of 2.88 cents per mile is substantially above the average expense per passenger per mile to the railroads.*

Again we call attention to the fact that, in 1922, a large amount of space in the cars hauled was unoccupied, and the increased travel caused by this scrip coupon book will reduce materially the average expense per mile to the railroads from the haul. Their increased travel will be practically net to them.

The evidence justified the conclusion that the ticket required by the Commission would probably increase the revenues of the railroads. It would certainly be of great service to the public, and increase the freight handled by the railroad companies. From the entire evidence, the Commission could correctly form the

conclusion that the reduced rate was just and reasonable. (An appendix showing the character of the evidence investigated by the Commission is hereto annexed.)

JURISDICTION WHICH THE COURT WILL EXERCISE TO CONTROL ACTION BY THE COMMISSION.

In *Proctor & Gamble vs. U. S., 225 U. S. 282, 56 L. E. 1091,* the Court placed definite limitations upon the jurisdiction to be exercised in cases like that now under consideration.

Chief Justice White delivered the opinion as follows:

> "Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred, although it may be not technically doing so. *Interstate Commerce vs. Union P. R. Co., 222 U. S., 541, 547; Interstate Commerce Commission vs. Illinois C. R. Co., 215 U. S., 452, 54 L. E. 280.*"

In the case of *Interstate Commerce Commission vs. Union P. R. Co.,* cited by the Court in the *Proctor & Gamble* case, supra, the Court held, first that the

Courts will not examine the facts on which the Interstate Commerce Commission based its order reducing rates further than to determine whether there was substantial evidence to sustain the order, and further that the Commission cannot be said to have based its order reducing rates on a mistake of law in regarding the long maintenance by the carriers of a lower rate while earning dividends as raising a presumption of reasonableness, where the reduced rate fixed by the Commission was higher than such earlier rate.

In this case the Court said:

> "In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. *It will not consider the expediency of the order, or whether on like testimony it would have made a similar ruling.*"

In *Interstate Commerce Commission vs. Louisville & N. R. Co., 227 U. S. 88, 57 L. E. 437,* Mr. Justice Lamar said:

> "The order of the Commission restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary but sustained by substantial, though conflicting evidence. The Court cannot settle the conflict nor put their judgments against that of the rate-making body."

In the case of *I. C. C. vs. Atchison, T. & S. F. R. Co., 234 U. S. 476, 58 L. E. 1408,* the Court said:

> "The argument for the petitioner necessarily invites the Court to substitute its judgment for that of the Commission upon matters of fact

within the Commission's province. This is not a function of the Court."

In *Baltimore & Ohio R. Co. vs. U. S., 521 U. S. 481,* the Court said:

> "Whether a rate is reasonable is a question of fact, not of law, and the opinion of the Interstate Commerce Commission is conclusive."

This Court has often ruled that it will not pass upon the weight of the evidence or the wisdom of the order of the Commission. It will only interfere when it is impossible to say that a fair-minded Commission would not have reached the conclusion stated. In the present case not only was the order of the Commission sustained by the evidence, but the order allowed any one of the carriers to appeal to the Commission for modification of the same, even to the extent of being excepted from the order.

THE COMMISSION'S ORDER IS NOT AN ARBITRARY AND UNREASONABLE DISCRIMINATION IN FARES BETWEEN SCRIP COUPON PASSENGERS AND REGULAR FARE PASSENGERS. IT WAS WITHIN THE POWER OF THE COMMISSION, AND DOES NOT LACK DUE PROCESS OF LAW.

In support of their contention No. 3, appellees urged that the 2,500 mile ticket at a 20 per cent reduction was an advantage given to a traveler who had $72 with which to purchase the ticket, and it was therefore discrimination against the man who did not have that much to pay, and who paid more per mile for his transportation.

This view is an entire misconception of the ticket authorized by the Commission. The average man in the United States does not travel even 250 miles per year. He does not invest $72 in transportation to be used up in twelve months, because he does not intend to travel any such distance in twelve months. The 2,500-mile ticket is intended for those as a class who will travel great distances each year.

Many traveling salesmen will use several of these tickets during the year, and especially as they can be obtained at a reduced rate. The cars of the trains have not been hauled full of passengers. The increase of travel brought about by this ticket will be with little or no additional cost to the railroad companies.

While the Act requiring the mileage or scrip coupon books is not limited to traveling salesmen, the evidence disclosed the fact that this class of travelers would be the chief users of this ticket. To their number will be added business men or professional men whose business furnishes a reason for extensive travel, and to claim that it applies simply to a class who can afford to invest $72 is entirely without merit.

The visitors from Boston, New York and Chicago to Miami, Florida, and return, are men of wealth, and yet they are given a greater concession on their rates than is given to the purchaser of these coupon books. They go to luxuriate in a climate of perpetual sunshine, while the traveling salesman and the business and professional man who will buy the 2,500-mile ticket is a working man, contributing by his work to the general prosperity of the country. The tourist goes for pleasure. He as a rule is a man of large means, yet he receives a greater concession in the reduction of his transportation than is given by this ticket to the traveling salesman and the business and professional man.

It is contended by appellee that commutation, convention, excursion, and tourist fares are clearly distinguished from the form of ticket here ordered, and enable the carriers to perform the transportation in volume and at reduced rates. This may be true as to commutation and convention tickets. It certainly is not true as to tourist tickets and resort tickets such as those discussed above. During a six months' period, they travel on reduced rate tickets from Boston, New York and Chicago to Miami, Florida. Visitors to these resorts go when they please, and return when they please. The tourist goes when he pleases and returns when he pleases. There can no more be special provision for transporting those traveling on these reduced rate tickets than there can be for those traveling on the scrip coupon books provided for in the order of the Commission.

It should also be borne in mind that the commutation, convention, excursion and tourist travelers who nearly all buy their transportation at reductions substantially less than the 20 per cent reduction provided for in these scrip coupon books, ride in the same cars with passengers who pay the 3.6 cents per mile.

There are some concession tickets, such as those given to conventions for which special preparation can be made by the railroad companies, but the large majority of the tickets sold with substantial concessions have no such element connected with them, and this contention of appellees is without merit.

The commutation tickets given to and from the large cities into the suburbs require a special service. The engines and cars provided for them must be kept ready and are used only for a few hours. There must be extra labor to handle this equipment. They carry a heavy overhead charge on account of the fact that

they use terminals built at great expense and frequently elevated tracks or facilities requiring terminals. These trains place an expense upon the railroad companies much greater than that of the ordinary passenger train moving away from the city upon main lines or branches.

Yet the railroad companies sell this transportation often at not one-half the cost of 3.6 cents per mile ticket, and the volume of business compensates for the low rate.

While the Commission balanced the value of the money which would be left with the railroads as an incident of the purchase of a 2,500-mile book, against the increased expense to the railroads of issuing the scrip coupon book, we insist that the estimate of length of time for which the money would be in the hands of the railroads is not sufficiently great. It was based upon the 1,000-mile books used in former times. This book is two and a half times as large and the railroad companies will have the money much longer. A large part of this money will remain with the railroads an average of three months, instead of an average of two months. A considerable portion will remain with them an average of six months. Indeed, practically all of that paid by those other than traveling salesmen will remain with the railroads an average of six months.

But, in addition to this, it should be borne in mind that the reduced rate tickets now sold by the railroad companies involve substantial expense. There are highly paid representatives of the railroads who solicit this business, and large sums of money are paid for advertising these special rates. We cannot take a daily or Sunday newspaper without finding in it excursion rates offered, in many instances at less than half the usual rate. None of this class of expense will be incident to the scrip coupon book.

The difference between the travel on a 2,500-mile ticket and that on an ordinary straight fare ticket is greater than that between those to whom reduced rates are being voluntarily furnished by the railroads and those of the ordinary straight fare ticket travelers.

Differences in Rates Charged Passengers Have Been Expressly Provided for in the Interstate Commerce Act, and Have Been Approved By the Courts.

The principle of equality between passengers which is required is equality under substantially similar circumstances and conditions, for like service. The true principle of equality should recognize that different allowances or different charges should be made for passengers, varying according to service and conditions. True equality is reached by varying charges as required by varying conditions.

In the case of *Interstate Commerce Commission vs. Baltimore and Ohio Railroad Co., 145 U. S. 263; 36 L. E. 699,* a distinction between the sale of tickets to a class at reduced rates and the sale of a single ticket is fully recognized.

The Baltimore & Ohio Company had sold a party-rate ticket covering the transportation of ten or more persons from one place to another, at the rate of 2 cents per mile, when 3 cents per mile was the regular rate for passengers.

The opinion in this case is most interesting and comprehensive. The Court ruled that:

"Railway companies are only bound, under the Interstate Commerce Act, to give the same terms

to all persons alike under the same conditions and circumstances, and in carrying large parties an inequality of condition and change of circumstance justifies an inequality of charge."

This opinion abundantly refutes the claim by appellees that the 20 per cent reduction is an unjust discrimination. The following language is used, referring to the Interstate Commerce Act:

> "In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. * * * The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, trips in parties of ten or more, lower than the regular single fare charged between the same points, and such lower rates were universally made at the date of the passage of the Act. As stated in the answer, *to meet the needs of the commercial traveler the 1,000-mile ticket was issued.* To meet the needs of the suburban travelers several forms of ticket were issued. * * * In short *it was an established principle of the business that, whenever the amount of travel more than made up to the carrier for the reduction per capita then such reduction was just and reasonable* both in the interest of the carrier and of the public. * * * If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing."

In this case the Supreme Court sustained a ticket which reduced by one-third the charge for parties of ten as compared with the ordinary charge placed upon a single person. The Supreme Court declared that the Interstate Commerce Act permitted the selling

at wholesale cheaper than at retail. A ticket for ten persons for a short distance did not make the wholesale feature of the ticket equal to the requirement, in the present case, that the ticket should be for 2,500 miles. In this case the reduction allowed is only 20 per cent, while the reduction on the party ticket was 33 1-3 per cent.

The attack upon the proposed legislation and upon the proposed order issuing these books at a cost less than the standard fare has been largely based upon the case of *Lake Shore & Michigan Southern Railroad Company vs. Smith, 173 U. S. 684.*

In that case the state of Michigan had undertaken to put into effect a measure requiring the railroad, when the ordinary fare was three cents a mile, to issue an interchangeable 1,000-mile book at two cents a mile, good for every member of the family of the man to whom issued, the ticket to continue good for two years when commutation tickets had never been issued for longer than one year, and the railroads were required to redeem the books if any part had not been used.

The Supreme Court held that with all these detailed requirements the Act was unconstitutional. Three judges of the Supreme Court dissented at the time. Mr. Justice McKenna, alone, of those upon the bench at the time, is still upon the bench, and he was one of the three who dissented.

In the *Lake Shore* case, the Supreme Court, among other things, questioned the propriety of giving to a class a rate different from the ordinary rate given to all persons. It questioned the propriety of giving a lower rate to tickets sold at wholesale from those sold at retail. The opinion dwelt upon the fact that the ticket was to be good for all the family of the holder,

and was to be good for two years, and that the unused portion of the ticket was to be redeemed.

The opinion in the *Lake Shore* case has not been followed by the Supreme Court in subsequent cases, but has been criticised, discredited, and, in part, set aside.

In the case of *Arkadelphia Milling Co. vs. St. Louis S. W. R. Co., 249 U. S. 134; 63 L. E. 517,* a rate was made, lower than the standard rates, on rough material going to companies which later shipped finished products, upon the ground that it made an unjust discrimination against shippers who did not ship the specific percentages of the finished product from the lines, the lower rate having been given only to those shippers who furnished a certain percentage of the manufactured product over the lines of the same carriers. The railroad company sought to enjoin the maintenance of the lower rate.

The Supreme Court said:

> "This schedule (i. e., of rates on rough materials) was established in the exercise of the legislative authority of the state, and could not be set aside by the court on the ground of discrimination unless it amounted to a denial of the equal protection of the laws guaranteed by the 14th Amendment.
>
> "But there is nothing to show that the rough material rates wrought any discrimination against the railway companies. They were applicable upon all railways alike. If there was—not in the least intimating that there was—undue discrimination as against small shippers or those who had no occasion to obtain transportation for the manufactured product over the line of the same carrier, this was not a matter of which the railroad companies could complain. It is most thoroughly established that before one may be heard to strike

down state legislation upon the ground of repugnancy to the Federal Constitution, he must bring himself within the class affected by the unconstitutional feature. *Plymouth Coal Co. vs. Pennsylvania, 232 U. S., 531, 544, 58 L. E., 713, 719; Jeffrey Mfg. Co. vs. Blagg, 235 U. S., 571, 576, 59 L. E., 364, 368; Mallinckrodt Chemical Works vs. Missouri, 238 U. S., 41, 54; 59 L. E., 1192; Thomas Cusack Co. vs. Chicago, 243 U. S., 526, 530, 61 L. E., 472, 475.*

"*Lake Shore & M. S. R. Co. vs. Smith, 173 U. S., 684, 43 L. E., 858,* did not set aside this established principle. The discrimination in favor of certain patrons, there referred to, was laid hold of rather as showing the unreasonable character of the regulation. *The authority of that case is not to be extended. Louisville & N. R. Co. vs. Kentucky, 183 U. S., 503, 511, 46 L. E., 298, Pennsylvania R. Co. vs. Towers, infra.*"

This decision not only limits the authority of the *Lake Shore* case, but it also decides that the alleged discrimination against ordinary passengers by this order is not a matter of which the railroads could complain, and that the railroad companies could not strike down the order upon the ground of its repugnancy to the Federal Constitution, not having brought themselves within the class affected by the alleged unconstitutional feature; and furthermore that a differentiation in rates because of distinctions in condition and circumstances is justified.

In *Pennsylvania Railroad vs. Towers, 245 U. S. 6,* the Court overruled, in part at least, the decision in the *Lake Shore* case, and declared that such parts of that decision which were in conflict with the views presented should be considered as overruled.

In the *Towers* case the Court cited 145 U. S. 263, the case of the *Interstate Commerce Commission vs. Bal-*

timore & Ohio Railroad. In that case the Court held that a party rate ticket for the transportation of ten or more persons at a rate less than that charged a single individual did not make a discrimination against an individual, charged more for the same service, or amount to unjust or unreasonable discrimination within the meaning of the Act to Regulate Commerce.

In the *Baltimore & Ohio* case the Court sustained the doctrine that the wholesaling of passenger transportation could be put at a lower rate than that allowed to the individual, so that the *Baltimore & Ohio* case laid down a rule entirely in conflict with the argument in the *Lake Shore* case.

While the Commission differentiated this ticket from the wholesale principle, as applied to resale of goods, and from the principle as applied to hauling in carload lots, it certainly cannot be distinguished from the case above cited, for in that case tickets sold to ten persons, although the total amount paid did not reach $72, were recognized as having applicable to them the wholesale principle.

Nor did the Commission distinguish the sale of this ticket from the wholesale principle as applied to companies furnishing gas, electricity or telephones, and the right of these companies is recognized to charge varying rates according to the amount of service to be rendered, even though that service is furnished customers, not all at once, but from time to time.

In the *Towers* case, the Court said:

> "In *Interstate Commerce Commission vs. Baltimore & Ohio R. Co., 145 U. S., 263, 35 L. E. 699,* this court held that a 'party rate ticket' for the transportation of ten or more persones at a less rate than that charged a single individual did not make a discrimination against an individual

charged more for the same service, or amount to an unjust or unreasonable discrimination within the meaning of the Act to Regulate Commerce. In the course of the opinion the right to issue tickets at reduced rates, good for limited periods, upon the principle of commutation, was fully recognized.

"Having the conceded authority to regulate intrastate rates, we perceive no reason why such power may not be exercised through duly authorized commissions, and rates fixed with reference to the particular character of the service to be rendered.

"*In Norfolk & W. R. Co. vs. Conley, 236 U. S., 605, 608, 59 L. E., 745, 747,* after making reference to *Northern P. R. Co. vs. North Dakota, 236 U. S., 585, 59 L. E. 735,* this court said:

"'It was recognized (in the *North Dakota* Case) that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services.'

"That the state may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the state the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which it involves, as do commutation rates, the disposition of tickets to passengers who have a peculiar relation to the service.

"The reasoning of these decisions is sound and involves no violation of the Federal Constitution. True it is that it may not be possible to reconcile these views with all that is said in the opinion delivered for the majority of the court in the case of *Lake Shore & M. S. R. Co. vs. Smith, supra.* The views therein expressed which are inconsistent with the right of the states to fix reasonable commutation fares when the carrier has itself established fares for such service must be regarded as overruled by the decision in this case.

In the *Minnesota Rate Case (Simpson vs. Sheppard, 230 U. S. 332)* the Court sustained a lower fare fixed for passengers under twelve years of age.

In *Interstate R. Co. vs. Mass., 207 U. S. 79,* a special rate less than the maximum for school children was approved, and the Court quoted with approval the statement in *People vs. Public Service Commission, 159 N. Y. App. Div. 513,* to the effect that:

> *"These cases indicate that the Smith case is not to be extended beyond the facts upon which it rests."*

In *Commonwealth of Massachusetts vs. Interstate Consol. S. R. Co., 187 Mass. 486,* the validity of an act providing that school children should be carried at half fare was upheld.

In *San Antonio Traction Co. vs. Altgelt (Tex. Civ. App), 200 U. S. 304,* the Supreme Court sustained an act requiring half fare tickets to be furnished by street car companies to school children.

In *Purdy vs. Erie Railroad Co., 164 N. Y. 42,* and in *Minor vs. Erie R. Co., 171 N. Y. 566,* a statute was upheld requiring thousand-mile ticket books at reduced rates.

In *Duluth Street Ry. Co. vs. R. R. Commission, 161 Wis. 262*, an order requiring a street railway company to sell six five-cent fares for twenty-five cents was upheld. See also *Norfolk & Western Ry Co. vs. Conley, 236 U. S. 605; Knott vs. Chicago, B. & Q. R. Co., 230 U. S. 475; 57 L. E. 1572.*

The Railroads Cannot Complain of a Grievance Which is Not Their Own

In *Interstate Commerce Commission vs. Chicago, R. I. & P. Co., et al., 218 U. S. 88, 54 L. E. 947*, the railroad companies attacked an alleged discrimination against certain trade centers which would be caused by the order of the Commission. The Court held that while the railroads would be heard as to the effect of the order on their revenues, their objections would not be considered on the ground that it discriminated between shippers and trade centers.

The Court ruled:

> "We have said several times that we will not listen to a party who complains of a grievance which is not his own. *Clark vs. Kansas City, 176 U. S., 114, 118; 44 L. E., 392; Smiley vs. Kansas, 196 U. S., 447, 49 L. E., 546.*"

In the case of *Louisville & N. R. Co. vs. Finn, 235 U. S., 601; 59 L. E. 379, 384*, the Court said:

> "It is incumbent upon one who seeks an adjudication that a state statute is repugnant to the Federal Constitution to show that he is within the class with respect to whom it is unconstitutional, and that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Constitution."

So that, in any event, the railroad companies have no cause to complain because some individuals may not have a sufficient amount of money to purchase this scrip coupon book, and may therefore be required to pay a rate per mile for their transportation different from that paid by the purchaser of the scrip coupon book. Nor can they complain of the scrip coupon book at the lower rate unless the rate is confiscatory, and we have clearly shown that it was not confiscatory.

THE ORDER REQUIRED THE SCRIP COUPON BOOKS TO BE ISSUED FOR TWELVE MONTHS. THE COURTS HAVE FREQUENTLY APPROVED EXPERIMENTAL ORDERS BY COMMISSIONS, AND SOMETIMES REQUIRED THEM.

The Court has been asked to intervene and enjoin an order of the Commission before any actual experience has shown the practical result of the rate thereby established. The evidence before the Commission as shown herein fully justified the conclusion reached by the Commission that the rates fixed were just and reasonable. Except in "clear cases" of confiscation, until it has been shown by experimentation that a rate is confiscatory or noncompensatory, the Supreme Court has held that the Courts will not interfere.

In *Knoxville vs. Knoxville Water Co., 212 U. S. 1, 53 L. E. 371,* Mr. Justice Moody said:

> "The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. * * * If hereafter it shall appear, under actual operation of this ordi-

ance (an ordinance fixing maximum water rates for the city of Knoxville), that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the court, * * * but as the case now stands there is no such certainty that the rates prescribed will necessarily have the effect of denying to the company such a return as would avoid confiscation."

In the case of *Wilcox vs. Consolidated Gas Co., 212 U. S. 19, 53 L. E. 382,* Mr. Justice Peckham uses the following language:

"Increased consumption at the lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished.

"Of course there is always a point below which a rate could not be reduced and at the same time permit the proper return on the value of the property but it is equally true that a reduction in rates will not always reduce the net earnings, but on the contrary may increase them. *The question of how much increased consumption under a less rate will increase the earnings of a complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test.*

"Where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation, * * * a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts."

The adoption of a practical test of rates has also been sustained by the Courts in *Tilley vs. Railroad Co.,*

5 Fed. 641, 662, and in *Pennsylvania R. Co. vs. Towers, 94 Atl. 337 (Md.).*

In the first of these cases, the Court said:

> "Which view is the correct one it is impossible to decide. * * * There is, however, a conclusive way, and one only, in which this controversy can be settled, and that is by experiment. A reduction in railroad charges is not always followed by a reduction of either gross or net revenue. It can soon be settled which is right—the Railroad Company's officers or the Railroad Commission—in their view of the effect of the Commission's tariff of rates, by allowing the tariff to go into operation."

In the case of *Pennsylvania vs. Towers,* above cited, the Court said:

> "It may turn out as the result of the revision of these tariffs that there will be more monthly tickets sold and fewer of the 100-trip tickets, but all of this is to a very considerable degree a matter of conjecture merely. The true test of the effect upon the revnue of the changes made must, and can only, be the test of time and practical experience."

See also *C. B. & Q. R. Co. vs. Dey, 38, Fed. 556,* and *I. C. C. vs. Illinois Cent. R. Co., 215 U. S. 451, 54 L. E. 281.*

See also *New England Divisions case, infra,* p. 47.

It is true that counsel for the railroad companies insist that no real information can be obtained from the experiment, but the Commission believed that information could be obtained that would be vital. They require certain reports to be kept. They permitted

any one of the railroads affected to apply later on to the Commission and submit evidence upon the subject. The number of these scrip coupon books sold and used, the balance of the passenger travel, how the total revenues of the railroads are affected, all these will be evidence furnishing information as to the ultimate effect of this ticket on the railroads. Undoubtedly the tickets will stimulate business and thereby secure to the railroads an increase in freight. The experimental nature of the order is an additional reason for holding it just and reasonable.

THE NEW ENGLAND DIVISIONS CASE

The case of *Akron, Canton & Youngstown Railway Co. vs. U. S., 67 L. E. 308, 315,* decided in February, 1923, is known as the New England Divisions Case. This case grew out of the fact that the Interstate Commerce Commission had provided, by an order entered in *Ex parte 74,* a division of freight rates between the New England carriers and carriers operating West of the Hudson River. Subsequently a second order of the commission increased the proportion of these rates to the New England roads 15 per cent. The roads west of the Hudson River sought to enjoin this order.

The opinion of Mr. Justice Brandeis, delivered in this case, applies to a number of points raised by appellees in the present case.

The Court said:

"The order entered in *Ex parte 74* was at all times subject to change. The special needs of the New England lines were at all times before the Commission. That these needs were met by two orders instead of one, is not of legal significance.
* * *

"To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. * * *

"Whether a hearing was full, must be determined by the character of the hearing, not by that of the order entered thereon. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. The Commission recognized, and observed, these essentials of a full hearing. * * *

"*That the evidence left in the minds of the Commission many doubts*, is true. But it had brought conviction that the New England lines were entitled to relief. * * *

"*A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently;* and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. * * * That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution. * * *" (Italics ours.)

THE ACT AND THE ORDER DO NOT APPLY TO INTRASTATE PASSENGER TRAVEL

Neither the act nor the order under consideration apply to transportation of passengers wholly intrastate. The amendment was part of the Interstate Commerce Act, and the general provisions of the Act with reference to limitation of the authority of the Commission were applicable to this amendment.

In *Texas vs. Eastern R. Co., 258 U. S. 204; 66 L. E. 566,* this Court held:

> "Provisions of the Transportation Act of February 28, 1920, which are amendments of the Interstate Commerce Act, and are so styled, are to be read in connection with the Interstate Commerce Act and its other amendments."

The Court was considering new paragraphs which had been added to the Interstate Commerce Act. These additional paragraphs did not specifically state that they related alone to interstate commerce, and the question arose as to their proper construction.

The Court said:

> "If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said: 'Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" (Id. 217.)

The rule of construction which will find a constitutional meaning for a statute, if it can be done, is so thoroughly established, and so universally recognized, authorities upon this subject need not be quoted.

We call attention to the foregoing authority as it applied specifically to the Interstate Commerce Act, and it covers the question raised by counsel with ref-

erence to the meaning of the amendment to the Interstate Commerce Act now under consideration. The same rule would equally apply to the order of the Commission. Neither the Act nor the order of the Commission should be construed to apply to travel exclusively intrastate.

THERE IS NO UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER TO THE COMMISSION IN THE PROVISIONS OF THIS STATUTE.

In the nature of the case, the standards set up to guide the Commission in its action can be general only. The Commission was to exempt certain carriers where the particular circumstances justified such exemption. Congress could not possibly specify the detailed circumstances under which the Commission might or might not exempt certain carriers from the operation of its order; that determination was wisely and lawfully left to the Commission. The provision made by Congress in this connection is the only practicable one under the circumstances.

In *Attorney General vs. Old Colony Railroad, 160 Mass 62,* the Act of the Legislature left to the Board of Railroad Commissioners of Massachusetts the determination of what companies should be exempt from a regulation directing the sale of mileage tickets. The Court held that the law was not unconstitutional on the ground that it delegated legislative power to the Board of Railroad Commissioners.

In *Interstate Commerce Commission vs. Goodrich Transit Co., 224 U. S. 192, 56 L. E. 729, 737,* the Court said:

"Furthermore, it is said that such construction of paragraph 20 (of the Interstate Commerce Act) makes it an unlawful delegation of legislative power to the Commission. We cannot agree to this contention. The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in this court, and needs no amplification here. *Buttfield vs. Stranahan, 192 U. S., 470, 48, L. E., 525; Union Bridge Co. vs. U. S., 204 U. S., 364, 51 L. E., 523; U. S. vs. Grimaud, 220 U. S., 506, 55 L. E., 563.*"

In *Louisville & Nashville Railroad Co. vs. Garrett, 231 U. S. 298, 58 L. E. 229,* and in *Kansas City S. R. Co. vs. U. S. 231 U. S. 423, 58 L. E. 296,* the Court upheld statutes making general provision for the regulation of railroad accounting by Railroad Commissions, where it was contended that such statutes unconstitutionally delegated legislative authority.

In *Lehigh Valley R. Co. vs. U. S., 234 Fed. 682,* the District Court of Pennsylvania held that the delegation to the Commission of authority to make orders permitting the common control of two competing carriers, where warranted by the circumstances, as shown to the Commission, was not unconstitutional.

The Provision in the Order of the Commission Exempting Certain Roads From Its Operation Was Just and Reasonable.

The Commission exempted all the roads of Class II, Class III and switching and terminal companies. It also exempted some portions of other lines, leaving 176 carriers, all Class I, to which the order was applicable. The authorities before cited show that appellees cannot complain of an order which did not injure them. They complain that they were required to issue a scrip coupon book at a reduced rate. The fact that other roads were not required to issue the scrip coupon book at a reduced rate does not in any way injure the 176 carriers subjected to the order, but the reason of the Commission for exempting the 997 carriers from issuing this scrip coupon book is just and reasonable. They were short lines, electric lines, switching and terminal carriers whose business was almost entirely intrastate. Many of them had no passenger traffic and did not sell passenger tickets to points on other lines. They were carriers entirely differing in class from the 176 to which the order was made applicable.

Upon this subject the Commission found:

> "The principal reasons assigned for exception by the short lines, the electric, and the switching and terminal carriers are that they are engaged chiefly in intrastate commerce, that their passenger traffic is negligible, that they do not honor or sell passenger tickets to and from points on other lines, that they have no passenger train service, and that there will be little or no demand of them for interchangeable scrip or mileage tickets. We are of the opinion that the particular circumstances shown to us warrant the exemption of all

carriers by rail which are not intcluded in Appendix C."

Appellees have complained of the order excluding all but 176 roads, and again they, in effect, complain because they were not all included. If anything were necessary to relieve doubt about the protection of the railroads from loss on account of requiring them to do business on the credit of other railroads, the fact that only the Class I roads are included in this order is sufficient.

In *Wilson vs. New, 243 U. S. 332,* the Court held that the Adamson law which exempted short lines and electric railroads did not violate the constitutional requirement of equal protection of the laws.

Chief Justice White, delivering the opinion of the Court, said:

> "The want of equality is based upon two considerations. The one is the exemption of certain short lines and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions." (Id., 354.)
>
> *Dow vs. Beidelman, 125 U. S., 680, 31 L. Ed. 841; 8 Sup. Ct. Rep., 1028; Chicago R. I. & P. R. Co., vs. Arkansas, 210, U. S., 458, 55 L. Ed., 290, 31 Sup. Ct. Rep., 275,* and other cases.

Appellees insist that the classification of the roads, according to their earning capacity, was illegal and cite *Cotting vs. Kansas City Stock Yards Co., 183 U. S. 79.*

This decision was a stock yard case.

With reference to it in *Arkadelphia Milling Co. vs. St. Louis S. W. R. R. Co., 249 U. S. 134,* the Court held

while the opinion of Mr. Justice Brewer covers a wide range of discussion, a majority of the Court placed the decision upon the ground that the statute of Kansas applied only to a single company, and not to others engaged in *like business* in the state, and thereby denied to that company the equal protection of the laws.

THE REQUIREMENT OF THE ACT THAT ONE CARRIER SHOULD TRANSPORT PASSENGERS UPON THE CREDIT OF EVERY OTHER CARRIER DOES NOT VIOLATE THE FIFTH AMENDMENT, TAKING THE CARRIERS' PROPERTY WITHOUT DUE PROCESS OF LAW.

The criticism by appellees, of the Act and order of the Commission thereunder, claiming lack of due process of law, can hardly be taken seriously.

In *12 C. J. 1195*, it is stated:

> "So numerous, so varied, and in many cases so trifling have been the questions raised as to the protection afforded by the guarantee of due process of law that objections founded on it have been judicially characterized as 'those last resorts of desperate cases,' " citing *Commonwealth vs. Philadelphia, 145 Pa., 283, and Davidson vs. New Orleans, 96 U. S., 97, 24 L. E., 616.*

In the latter case, the Court, speaking through Mr. Justice Miller, said:

> "In fact it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccessful litigant in a State Court

> of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

In the case of *Pennsylvania Co. vs. U. S., 236 U. S. 351, 59 L. E. 617,* the Court upheld the proposition that the property of one carrier is not appropriated without compensation to the use of another carrier, contrary to the 5th Amendment to the Constitution, by an order of the Interstate Commerce Commission requiring the interchange of carload freight, citing and quoting at length from the case of *Grand Trunk R. Co. vs. Michigan R. Commission, 231 U. S. 457, 58 L. E. 310.*

In the latter case, the Court, after differentiating the case of *Louisville & Nashville R. Co. vs. Central Stock Yards Co., 212 U. S. 132,* cited by the appellee, in the lower court, said:

> "In the case at bar a shipper is contesting for the right (i. e., to interchange cars and traffic) as a part of transportation. The order of the Commission was a recognition of the right, and legally so."

In the case of *Michigan Central R. Co. vs. Michigan R. Commission, 236 U. S. 614, 59 L. E. 751,* also cited by appellee, the Court held that the property of a carrier is *not* taken without due process of law, contrary to the 14th Amendment by an order of the Michigan Railroad Commission, requiring such carrier to interchange carload and less than carload shipments and passenger traffic.

In the present case, the Commission sent out notices to the carriers of a hearing. They were given all the time they desired, presented evidence, and were allowed, at the hearing, to be represented by counsel, and

to support their contentions by written arguments. In the proceedings before the Commission the fullest consideration was given to the matter presented by the carriers, and the order was passed only after the most complete investigation of their views.

In the case of *Louisville & N. R. Co. vs. Finn, 235 U. S. 601 L. E. 379, 384,* with reference to Kentucky statutes No. 820a, authorizing the State Railroad Commission to determine whether a railroad company had been guilty of extortion, and if it had, then to establish a just and reasonable rate for services thereafter to be rendered, and No. 829, authorizing the Commission to hear and determine complaints thereunder and to render such awards as it might deem proper, the Court said:

> "We have already seen that there was evidence to support the Commission's affirmative finding upon the latter point. And this leaves no basis, as we think, for appellant's present attack upon No. 829 as repugnant to the due process provision of the 14th Amendment. In the proceedings before the Commission, there were pleadings sufficiently formal, and appellant was permitted to raise such issues and introduce such evidence as it desired." (See also *Buttfield vs. Stranahan, 192 U. S., 470; 48 L. E., 525.*)

Appellees in the Court below cited *Attorney General vs. Old Colony R. Co., 160 Mass., 62,* in support of the proposition that the Act violates the 5th Amendment, taking the carriers' property without due process of law, since it requires one carrier to transport passengers upon the credit of every other carrier.

This decision was rendered in 1893, and while the majority of the Court did hold the Act invalid be-

cause it "compelled one railroad to carry passengers on the credit of another," and stated, "We have been referred to no judicial decision where any such legislation has been considered," Mr. Justice Knowlton dissented, and Mr. Justice Holmes, now of the Supreme Court, concurred in this dissent and said:

> "It is a matter of common knowledge that every railroad does business on the credit of other railroads, to a much larger amount than would ever be done under a statute of this kind. But, suppose there is a possibility of trifling loss in a case which might arise under the statute, that does not render the statute unconstitutional."

The dissenting opinion of Mr. Justice Knowlton, concurred in by Mr. Justice Holmes, is a correct presentation of the law as the Courts now interpret it.

It is furthermore true that a fund collected by a railroad from the sale of a ticket from other roads should properly be regarded as a trust fund in the possession of the original seller, and any Court of Equity should so recognize it, and hold the fund for the beneficiaries to whom it was due, certainly to the extent that any of the coupons might have been used on another road. "Such balances have been regarded as debts of a preferred character when there was a receivership." *Atlantic Coast Line* case, *infra.*

This question has been further considered by the Court in *St. Louis S. W. R. Co. vs. U. S., 245 U. S., 136, 62 L. E., 199, 207.* In this case the Court said:

> "But it is contended that if a carrier establishes a through route and joint rate with its connections, it creates in effect a relation of partnership; that this relation must be entered into, if at all, voluntarily; and that to 'Compel a carrier

chartered by a state' to enter into such a relation with a carrier chartered in another state violates the 5th Amendment of the Constitution. The complaining carriers having engaged in this particular commerce, it is clear that Congress has power to regulate it." Citing *Atlantic Coast Line Case, 219 U. S., 186, 55 L. E., 167.*

This question is too well settled to require lengthy exposition. The lower court, in its opinion, correctly summarized the law in this respect, citing the *Atlantic Coast Line Case, Michigan R. Co. vs. Michigan R. Com., and St. Louis S. W. Ry. Co. vs. U. S., all of which are discussed above.*

CONCLUSION.

1. The Act and the history of its passage show that the mileage ticket or scrip coupon book provided for by the Act was expected to be a ticket sold at a rate less than 3.6 cents per mile.

2. The Commission found from the evidence that the scrip coupon books should be sold at less than 3.6 cents per mile, and that a reduction of 20 per cent was just and reasonable. The Commission did not abdicate the functions vested in it.

3. There having been before the Commission evidence that the passenger cars of the railroad companies were being moved only partially filled and that the reduced rate would greatly increase travel without any substantial additional cost to the railroad companies, there was evidence to sustain the conclusion that a 20 per cent reduction would be just and reasonable, and the courts will not interfere with the discretion of the Commission.

4. There was no lack of due process, for the railroad

companies were cited before the Commission and given by the Commission the amplest opportunity to present their case, both by witnesses and by counsel.

5. The rate fixed was not confiscatory:

(a) The receipts by the railroad companies for passenger transportation during the first six months of 1922 were $500,000,000. The revenue passenger miles of railroad companies for the same period was 16,467,000,000. This made the average receipt per passenger per mile 3.03 cents. The operating expenses were 85.24 per cent, which made the average cost to the railroad companies 2.58 cents per passenger mile. The order of the Commission provided that the scrip coupon books should be sold at 2.88 cents per mile, substantially more than the cost per mile for transportation in 1922;

(b) The revenue passenger miles of the railroad companies in 1920 were 46,849,000,000, but for the first six months of 1922 were only 16,487,000,000. In 1919 the average passengers per car was 21. During the first six months of 1922 the average passengers per car was 15. The proof showed that the scrip coupon books would greatly increase travel by filling up the cars without adding any substantial expense to the railroad companies;

(c) Without resorting to the doctrine of recapture, which would be just and reasonable in view of the enormous increases made in the last few years in charges for passenger service, the evidence supported the conclusion that the increase of travel would prevent any loss of net revenue by the railroad companies.

(d) The order of the Commission required a trial of this reduced rate for eight months, after which time results could be brought by the railroad companies to the attention of the Commission for further consideration.

6. The order did not create an arbitrary and unreasonable discrimination in fares between passengers but, if it had done so, this was not an objection which the railroad companies could successfully urge, as the railroad companies can not complain of a grievance which is not their own.

7. The authority of the *Lake Shore* case has been confined by this court to the facts in that case. They differ greatly from those in the present case. The reasoning of Justice Peckham in that case has not been accepted by this court as sound.

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APPENDIX

The Evidence Before the Commission.

Mr. Fox, a witness for the railroads, said, in the hearings before the Commission:

> "Prior to the 2c fare laws, however, mileage tickets were sold very extensively throughout Central Passenger and Western Passenger Association territories, and their utilization was constantly increasing from year to year." (P. 157.)

One cannot say from the evidence that certain carriers may not always have held, or numbers of carriers may not sometimes have held, the belief that mileage was contrary to their interests, but what the motives behind this attitude were does not appear, and as far as appears from the persistence of this practice despite variations in its application, it would seem that the carriers continued it not because they could not cooperate for its removal, but because they believed or hoped, as the witness said (p. 116) it would increase their revenue.

It appeared (p. 157) that up to Federal control mileage discounts continued as follows:

> In New England 10%, in Central and Passenger Trunk Lines Passenger Associations 10%, in Southeastern territory 20%, although permission had been then obtained from the Interstate Commerce Commission to reduce the percentage and actual reduction was awaiting authority of State commissions, in Southwestern territory 16 2-3%; in a major portion of the Western territory 16 2-3%. There were some reductions which ranged greater and in times past were in excess of 10%; in some regions running as high as 33 1-3%. (P. 157.)

The only witnesses for carriers themselves admitted (p. 107):

> "The evidence of this character necessarily is largely *fragmentary.*"
>
> "I don't know from statistics whether there was more travel as a result of these reduced rates, so that of course, I would not be prepared to say now if there were a reduced rate that traffic might be stimulated." (P. 116.)

Again they showed the value in their own eyes of the evidence presented by the carriers to the Commission as follows:

> "Data is not available that would directly show either increase or decrease in the passenger revenue created by the use of these mileage books." (P. 118.)
>
> "I have no direct information or figures to show whether or not loss of revenue resulted from the issuance of mileage books at reduced rates. It would be practically impossible to compile data of that character. I would not know how to go about it." (P. 121.)
>
> "I have no data to show whether or not the issuance of interchangeable mileage books in the past was profitable to the carriers. We have no facts or figures to show whether loss of revenue would result now from the issuance and use of interchangeable scrip books at reduced rates." (P. 124.)
>
> "At this moment I am unable to make any suggestion that would make it possible for the Commission to draw an inference either way as to the effect the use of mileage books has had upon the revenue of the carriers using them. I do not at present know of any data." (P. 124.)
>
> "With reference to the time when mileage books

were sold at reduced rates I can tell you how much of the total passenger revenue was derived from their use, but I cannot tell whether or not their issuance and use increased or decreased the total passenger revenue." (P. 125.)

Moreover, the amount of direct loss in revenue, without regarding stimulation of traffic, which will accrue to the carriers of the country and to the Eastern carriers particularly was not stated with such positiveness in the testimony as in the petition of the carriers in this action.

In the first place it was based for the country upon an estimate that the total average revenue derivable from ordinary one way tickets sold at full normal fares was about one billion dollars annually, the witness said as to this, however, (p. 156):

"It is a guess, except that we know rather accurately what the surcharge and the commutation are."

It was next estimated (p. 158) that 30% of this travel at full fares would be made on an interchangeable scrip coupon ticket good for $90 transportation to be sold at $72. However, it was said as to this:

"This is the best judgment of the carriers, but it is *purely* speculative."

Even this *pure* speculation should to some extent have been based upon past experience in the use of mileage books. (P. 156.) *It was not shown in stating such figures for the past how much they represented of travel, which would have moved at the full fare, and*

how much of newly created traffic. These carriers produced no evidence to the commission of any weight showing even the direct reduction of revenue, without considering the stimulation of traffic brought about.

Regarding excursion, convention, commutation and tourist fares, although the witness could see no increase as a result of mileage or coupon books, it was admitted that the former were justified in whole or in part by the *stimulation of traffic brought about;* the witness said:

> "A ticket sold at a tourist fare is what the passenger representatives would term a created business. It is new business that they would not otherwise derive. It adds to the passenger revenues, rather than detracts from them and there is a great difference as between mileage, reduced rate mileage ticket, and the ticket sold at a reduction to the tourist." (P. 109.)

With this certainty as to the increase of revenue by tourist fares, it was strange that the witness could not show experience as to whether mileage tickets had or had not in the past increased travel and revenue.

Again the witness said:

> "The ten-ride commutation ticket and the family commutation ticket all add to the daily average travel which produces that return on the carload service which we have previously alluded to. It is not as frequent as the daily passenger, but a twenty-five-ride ticket does produce averages which enable the entire commutation business to make a satisfactory net return." (P. 110.)

And further:

> "Through tickets from New York to the coast, for example, at a reduced rate, are issued in order *to encourage business;* that is, *to encourage any-*

body who wants to use them, the traveling public generally. When I use the word 'business' I do not mean the merchant or the commercial traveler only; I mean the traveling public generally. The through ticket from Chicago to the coast and return, at a reduced rate, is issued *to encourage traffic,* not traveling salesmen only but of the general public." (P. 116.)

"During the past year the carriers have voluntarily issued a considerable number of excursion tickets at reduced fares, some of which were one-third reduction from the standard fares. There was a great range in the reduction. Some were 10%. This was done to stimulate travel." (Pp. 158, 159.)

No analogy was apparent to the witness between dead space and dead weight carried by the railroads without compensation for lack of business and dead goods of which the merchant had to dispose. Yet at the time the railroads were hauling passenger cars carrying an average of but 15 passengers per car.

"The merchants were trying to stimulate business. They were very largely stocked; they had to get rid of dead goods. The railroads have no dead goods; they are selling only one commodity which they cannot afford to sell at a loss." (P. 123.)

The witness said in speaking of the number of mileage clerks required in 1915, 1916 and 1917 by the Southern Railway: (p. 159)

"There is no substantial increase of mileage clerks even though there is a substantial increase of passenger business."

As to the danger from scalping and other abuses, the witness said: (p. 122)

> "If all of these provisions (identification by photograph, etc.) were adopted I would consider a photographic form of ticket interchangeable for coupons at stations before the passenger boards the train reasonably protective."

The carriers have urged that if there were any profit to be derived from the sale of scrip coupon tickets they would be the first to desire its adoption. Even if the carriers had come to such conclusion without being influenced by consideration of other factors than the result of the scrip ticket on net revenue, the commission, of course, would not be compelled to accept their self-presumed judgment. However, when it is considered that this judgment of the carriers may be swayed by ulterior motives having nothing to do with the effect on net revenue, the failure of this contention is readily apparent. As an example of what is meant the witness said: (p. 108)

> *"Wherever a reduced mileage rate prevailed, the traveling public to a considerable extent could not be convinced that the same basis should not prevail for all regular passenger travel. The pressure was always for a downward revision."*

Of course, no such reason affects the reasonableness of the scrip rate, but it emphasizes that the carriers so-called judgment as to the value of the scrip coupon ticket at a reduced rate in maintaining or increasing net revenue should not have had before the Commission and has not before this court the weight which they would claim for it.

The record discloses that men for many years interested in pasenger and freight traffic over the railroads of this country and all long experienced with problems of transportation, representing the International Federation of Commercial Travelers, the American Hotel Association, The Merchants Association of New York, testified that the reduced rate scrip book would greatly benefit the public and the carriers alike. (pp. 126-131, 151-155.)

These men testified that, in their opinion, the rates now in force were so high that they discouraged and seriously curtailed travel by the very persons, who if proper reduction were fixed, would not only themselves do such an additional amount of traveling as would more than compensate the carriers for the direct loss from such a reduction, but a great majority of whom would also by the additional amount of effort they would be enabled to put forth as a result of such a reduction, so stimulate the commerce of the country and its business generally that the freight traffic also of the carriers would be increased.

In support of these statements the witnesses testified that the reduction would be an inducement to traveling salesmen on commission now reluctant to venture into new territories and business houses now finding it impracticable because of the expense entailed to open up new territory, to do so, that in the same manner and for the same reasons many more salesmen would travel, and that all salesmen generally as well as other people would make longer trips.

Mr. John F. Shea, a member of the executive council of the American Hotel Association and chairman of its travel bureau committee, stated: (p. 128)

"I am of the firm opinion, as are also my associates, that any reduction in passenger rates either by the use of interchangeable scrip book or tickets of any kind, immediately develops business, and there is constant and immediate reaction felt in the hotels of the United States. Hotels of the United States are particularly situated in that manner, that the slightest imposition put on travel or the loosening up of travel, immediately is felt by them."

Aaron M. Loeb, President of the National Council of Traveling Salesmen's Associations, member of the executive committee of the New York Men's and Boys' Apparel Industries, Inc., and sales manager of a large manufacturing concern, said: (p. 131)

"I will illustrate how the mileage traveled may be increased even without enlarging the general territory covered. We have practically today eliminated all towns under 5,000, because it does not pay us with the present excessive cost of travel to have our men make those smaller towns. Formerly we made everything of 2,500 and upward; in some instances as low as 1,500. Now those merchants in the smaller towns are deprived of the facility of making personal selection from samples shown them by traveling salesmen, which is a decided advantage for the smaller dealer in the small town, who otherwise is compelled to order from catalogue or by the open-order method, whereby he may get what he wants and he may not."

James C. Lincoln, traffic manager of the Merchants' Association of New York, testified to the above effect for that association (p. 153), for the Chicago Association of Commerce (p. 154), and the National Wholesale Grocers' Association (p. 154).

In the record (pp. 131 and 151) will be found the expression of many merchants throughout the United States who state that if a mileage book is issued at a reduced rate it will greatly stimulate business and travel. The investigation conducted by the commercial travelers includes firms, both small and large, covering all sections of the country, and in varied lines of business. (A partial list of the commodities in which some of these firms deal, given below, was submitted to the Commission.)*

The unanimous and confident estimate of merchants is shown that reduced rates will stimulate passenger and freight carriage far beyond any temporary loss in revenue directly entailed by the reduction. *They give specific information as to the number of men taken off the road, decrease of traveling in weeks, the*

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* Men's Clothing
Yarns and Art Needlework
Wall Paper
Tobacco
Corsets
Hats and Caps
Brushes
Silk
Pianos
Shoes
Music Publications
Laces and Embroideries
Gloves
Tools and Saws
Paints
Paper
Cement
Veilings
Hosiery
Underwear
Books and Periodicals
Cotton Goods
Sponges and Chamois
Inks
Bags
Ladies' Dresses
Waists
Petticoats
Textiles
Metals
Neckwear
Ribbons
Phonographs
Shade Rollers
Automobile and Rain Coats
Linens
Fruit Products
Gum and Mica
Twines and Cordage
Pens
Sweaters
Fancy Goods
Uniforms
Bicycle and Auto Supplies
Woolens
Notions
Lace Curtains
Toys
Confectionery
Shirts
Carpets
China
Jewelry
Stationery

limitation of, the retarding of business, all of which they attribute mainly to the high rates of transportation; they state definitely that with a reduced rate of from 25% to 33 1-3%, merchants would increase the number of men on the road, extend territory covered as well as the time of trips; that such reduced rates would enable them to reenter and open to trade, country districts and smaller towns. They show how the higher cost of transportation has driven merchants whose selling departments need a large amount of transportation to comparatively inefficacious expedients, resulting in large losses to the carriers, such as the use of the automobile, mail, photograph, telephone and telegraph. A few of these statements, indicative of the trend of this evidence, follow:

J. H. & C. K. Eagle, Inc., 265 Fourth Avenue, New York City, silk manufacturers: Mr. W. S. Fraser, Sales Manager, states: "We are very keenly interested in the securing of a general mileage book which would materially reduce the amount of money we are compelled to expend in traveling our force of approximately twenty salesmen. Naturally in times like the present when all institutions are endeavoring to hold their overhead down, the lowering of railroad charges would have a tendency to have our salesmen cover their territories more extensively and more frequently than they are now doing. Another fact to be considered is that we would also feel more inclined to increase our selling staff of traveling salesmen if the selling cost could be reduced from the high point that it has now reached. Railroad fares and hotel charges have both been excessive and anything that will tend in the direction of reducing them will undoubtedly have the effect as indicated above. We trust you may be successful in securing this much needed mileage book."

Straube Piano Co., Hammond, Ind., manufacturers of pianos: Mr. R. S. Dunn, Central and Northwestern reprepresentative, advises that their salesmen operate on commission without drawing account. With the present railroad rates the men will not attempt prospects where an order is not assured. "This leaves dealers all over the territory who could possibly be sold without a personal contact with our road men. When urged to make these calls, the salesmen simply tell us that they cannot afford to spend the money without assurance of an order. Regular established trade is visited but the missionary work without which no factory can exist is not done. Under lower rates, these men would feel justified in extending operations into new territory, and would double the present amount of traveling which has reduced itself to about fifteen weeks a year."

Bolway & Co., Syracuse, N. Y., phonographs: Mr. Frank E. Bolway, President, states that they traveled 20 representatives continuously during the year round for many years, but that during the past two years they have diminished their traveling to one-half the year. The cause for diminishing travel being high cost, adding that "present rates are destructive."

M. H. Birge Sons Co., Buffalo, N. Y., wall paper manufacturers, through Mr. Howard M. Eston, Vice-President, advise that their sales force has been greatly diminished and that they have reduced the number of weeks of travel from 37 weeks per annum to 17 weeks, excessive rates being responsible. Under more favorable rates they would feel inclined to make a more thorough canvass for business.

The Whitaker Paper Co., Baltimore, Md., Mr. J. Evan Resse, Managing Director, reports that they traveled 23 salesmen. The expense of traveling is so

heavy that it curtails their efforts and also forces their men to travel less than they would otherwise do. If the proposed legislation passes, it will doubtless stimulate the action of traveling men and it would have a wholesome effect on business generally. There is no question in the world but that the amount of traveling done by salesmen since the present high cost of transportation has been in force has been materially reduced. If this cost is reduced, the territory will be flooded with traveling men, and where the traveling man goes, there is business. They create business.

Edison Portland Cement Co., 8 West 40th St., W. D. Cloos, Vice-President and General Manager, announces that they travel 27 representatives and further states "practically all of our sales force now cover their territories in automobiles. If the railroad rates would be reduced 33 1-3% it is possible that our salesmen could cover their territories with the same efficiency, at greatly reduced cost per unit."

Fred'k Vietor & Achelis, 65 Leonard St., N. Y. City, cotton goods and yarns: Mr. T. Holt Haywood states that the present rates have been a great hardship for all firms traveling a number of men. We are traveling in this department from 13 to 15 men who cover the country from coast to coast and visit every city of consequence in every state, and on account of the rates which have recently prevailed, our men of course have not traveled as extensively as they might otherwise have done. There is no doubt that if the mileage books could be issued, it would be a very material incentive to travel our salesmen very much more than we have done in the past.

C. G. Crowley, 339 Broadway, New York City: They are now traveling 15 representatives, selling machine needles, cutlery, and that they would "double the num-

ber of men if railroad fares were reduced to a reasonable rate, such as is proposed in connection with the interchangeable mileage book."

S. S. Stafford, Inc., 603 Washington St., N. Y. City, manufacturers of ink: H. A. Barrett, Sales Manager, states: "We are deeply in sympathy with your move. We employ approximately 25 to 30 salesmen a year, who make from 2 to 4 trips over each territory. We have been reluctant to place additional men on the road on account of the excessive traveling expenses since 1917. Our average transportation fares at the present time, not taking into consideration special trips which are frequently necessary, are about $12,000 per year. Notwithstanding this fact, if the interchangeable mileage book is issued at 33 1-3% reduction, we would add to our selling forces."

Atterbury Brothers, Inc., 145 Nassau Street, New York City:. Mr. H. E. Atterbury, President of this company, states that the expense account of our firm relative to mileage for their salesmen has decreased and in place thereof they have been increasing the use of telephone and telegraph. "We estimate a 33 1-3 per cent reduction in railroad fare would result in a 25 per cent increase in the amount of traveling which would be done by our salesmen."

E. T. Eberhardt & Co., 874 Broadway, New York City, advises that traveling by their staff of salesmen was reduced fully 20% during 1920, 1921, on account of the high expense rates. Furthermore, they were compelled to reduce their lines from a trunk line to a suit case line as the expense of carrying a trunk was so high as to make it undesirable. In addition they state: "We believe that a reasonable reduction in general traveling expenses and particularly in railroad fares would increase the amount of our traveling imme-

diately to the mileage covered in 1917, 1918, amounting to an addition of 20 to 25 per cent over the present rates."

Grinnel Brothers, Detroit, Mich.: Mr. S. E. Clark, secretary, states: "It is getting to a point where the expenses are so heavy that few men can make good and unless some change is made so traveling expenses can be reduced, we shall be obliged to abandon that method of trying to do business. We believe railroad fares are too high and the railroad companies will get much less of our money for railroad fares on the present basis than they would get if railroad fares could be reduced considerably. We have covered the entire territory of Michigan for a great many years, but the heavy traveling expense is making it a severe problem as to whether or not we can continue. We could probably supply our salesmen with automobiles and we shall have to do that or something like that unless we get some relief in railroad fares."

The York Card & Paper Co., York, Pa.: Mr. John S. McCoy, General Manager, states: "Our sales force consists of 12 men. Previous to the war it was our custom to send the men out on three trips per year, aggregate between 7 and 8 months of actual traveling. On account of the high cost involved, we told our salesmen to let the customers know that we would only make one trip per year and this procedure resulted in cutting the traveling expense to one-half of what it was formerly or less. If it were possible to secure mileage books at a reduction of 33 1-3%, it would undoubtedly result in our men going back to the old traveling schedule, lasting from 7 to 8 months in each year."

The Tait Paper and Colo Industries, Inc., Glens Falls, N. Y.: Mr. T. S. Marshall, Vice-President and

General Manager, Wall Paper Division, states that they traveled 24 salesmen in 1917 at an average of three trips a year, on an average of 30 weeks each and carry four trunks over each territory. The effect of the high cost of travel has diminished their force to 16 and under a more favorable rate, they would probably increase their sales force without delay.

A. L. Clark & Company, Inc., 311 Sixth Avenue, New York City, staple notions and small wares, state: "The general selling cost, of which railroad fares and baggage were the greatest part, increased to such proportions that in July, 1921, we were compelled to withdraw our men from the road entirely and for the last six months of 1921 they did not travel at all. Furthermore, for the present year, we are preparing lines by photographs, etc., so they will only carry a special hand-case, no trunks whatsoever, in order to average by saving on baggage and transfer and equalize on actual expense. Should an interchangeable mileage book be issued at 33 1-3% reduction, we should not only increase but also return to sample trunks and arrange to increase the weekly travelers' period as well."

Ode & Gerbereux, 421 West Brodway, New York City, confectionery: Mr. Ode states that they traveled 6 representatives who make 7 business trips each year of 6 weeks each and adds that if an interchangeable mileage book at 33 1-3% reduction is issued, they would double the extent of their traveling. This in itself would mean 252 weeks of constant traveling, adding to the income for the railroads.

Stevens & Co., 375 Broadway, New York City, Manufacturers of Bicycle and Automobile Accessories and Tools: Mr. R. E. Pye, Sales Manager, states that they have reduced their sales force from 7 representatives

to 3 and the number of weeks on the road from 40 to 35, net loss, 175 weeks. "Greatly increased expense was a large factor in our determination as to whether or not we would maintain our full force. Would increase the sales force 25 per cent and the weeks traveled proportionately if an interchangeable mileage book were issued at 33 1-3 per cent reduction." Seven men traveled 40 weeks; total, 280 weeks. 1921: 3 men traveled 35 weeks; total, 105 weeks, net loss, 175 weeks.

It seems almost incredible, and must have seemed so to the Commission, that in all the years mileage books have been in use the carriers with all the statistical data available to them, with millions of dollars spent in their different statistical departments had not some pertinent information available.

The evidence set forth and shown above, by those in favor of reduced rate scrip was concrete evidence, such as would and did appeal to the business sense of an expert commission.